cutory injunction on January 11, 1984 we have to allow this appeal with costs here and below. We therefore set aside the Court Order dated May 25, 1984 and restore the interlocutory injunction dated January 11, 1984 until the disposal of Penang High Court C.S. No. 17 of 1984. We also order an early trial of this action in October 1984 before another Judge. Deposit of $500/– to be refunded to the appellant.

Order accordingly.

Solicitors: *Syarikat Mohideen Abdul Kader, Shearn Delamore & Co.*

Q.B.E. SUPREME INSURANCE BHD. & ORS. v. SYARIKAT CHEMAS PEMBORONG SDN. BHD. & ORS.

[O.C.J. (Abu Mansor J.) November 12, 1984]

[Kota Kinabalu – Civil Suit No. K486 of 1983]

Practice and Procedure – Order 14 application – Guarantee and indemnity – Defence not bona fide – Conditional leave to defend – Denial of signing by 2nd & 3rd defendants – R.H.C 1980, O.14 & O.38 r.2(3).

In this application, the plaintiffs applied for final judgment under O.14 against the 2nd and 3rd defendants for a stated sum of money in connection with the guarantee and indemnity given by them to the plaintiffs. In the course of the proceedings counsel for the plaintiffs asked only for order for conditional leave to defend to be given to the 2nd and 3rd defendants. He submitted that there was reasonable doubt in the 2nd and 3rd defendants' defences and they therefore ceased to be *bona fide*. The 2nd defendant denied signing the said letter of indemnity (in his personal capacity) and the 3rd defendant also denied signing it.

Held: (1) before the learned judge ordered the 2nd and 3rd defendants be given conditional leave to defend, he must be satisfied that there was no real substantial question to be tried or that there is no dispute as to facts of law which raises a reasonable doubt that the plaintiffs are entitled to judgment;

(2) the learned judge made a finding that the 2nd defendant did in fact sign the indemnity in his personal capacity as well and he therefore doubted the *bona fide* of the 2nd defendant's defence;

(3) the 2nd defendant was given leave to defend on condition that he deposit the stated sum claimed within one month failing which the plaintiffs were to have liberty to sign final judgment. The 3rd defendant was given unconditional leave to defend;

(4) costs of the plaintiffs for the application to be taxed in respect of the 2nd defendant. No order as to costs in respect of the 3rd defendant.

Cases referred to:

(1) *Chong Chow Fong* v. *Ban Tuck (Malaysia) Sdn. Bhd.* [1983] 2 C.L.J. 25.
(2) *Fieldrank Ltd.* v. *Stein* [1961] 3 All E.R. 681.
(3) *Cho Chin Huat* v. *Lee Boo Hock* [1970] 1 M.L.J. 112.
(4) *Foong Weng Tat* v. *Vu Siew Chin* [1974] 2 M.L.J. 20.
(5) *Jacobs* v. *Booths Distillery Co.* [1901] 85 L.T. 62.

SUMMONS-IN-CHAMBERS.

C. I. Robertson for the plaintiffs.
Miss Chong Poh Shan for 2nd & 3rd defendants.

Cur. Adv. Vult.

Abu Mansor J.: On April 18, 1984, the plaintiffs herein took out a summons under Order 14, Rules of the High Court, praying for final judgment in this action against the 2nd and 3rd defendants for the amount claimed in the Statement of Claim with interest and costs to be taxed. In support of this application, the plaintiffs' manager, Cheng Kam Meng, swore an affidavit dated January 25, 1984, setting out the details of the plaintiffs' claim wherein at Paragraph 3 of the said affidavit he summarised:

"The 2nd defendant, Chu Yun and the 3rd defendant, Yip My Chua (f), jointly and severally with the First, Fourth, Fifth and Sixth Defendants, are and were at the commencement of this action justly and truly indebted to the abovenamed Plaintiffs in the sum of $120,260.35 in connection with their (the Defendants') guarantee and indemnity given to the Plaintiffs consequent upon the Plaintiffs issuing a counter indemnity in favour of their (the Plaintiffs') bankers, the Bumiputra Merchant Bankers Berhad, in consideration of which Bumiputra Merchant Bankers in turn issued the banker's guarantee of $120,260.35 in favour of the Sabah Ports Authority."

In opposition, the 2nd and the 3rd defendants put in their affidavits dated June 16, 1984 and August 7, 1984, respectively. In paragraph 19 of 2nd defendant's affidavit, among other defences, he denied signing the said letter of indemnity (in his personal capacity) and in paragraphs 6 and 7 of the 3rd defendant's affidavit she also denied signing the letter of indemnity and therefore denies liability to the plaintiffs in the said sum.

At the hearing of the Order 14 Summons on November 5, 1984, Mr. C.I. Robertson for the plaintiffs, pursuant to an earlier notice, made an application to cross-examine the 2nd and the 3rd defendants on their respective affidavits citing

O.38, r.2(3) of the Rules of the High Court 1980 and in support the case of *Chong Chow Fong* v. *Ban Tuck (Malaysia) Sdn. Bhd.*[1]. Miss Chong Poh Shan for the 2nd and 3rd defendants objected to this application on the ground that there will surely be denials by the defendants and in the absence of other evidence and having to rely solely on the answers given in the cross-examination, the Court would still have difficulty in giving summary judgment. I considered this application and at the end of which, exercising my discretion, I turned down Mr. Robertson's application as I agree with the defendants' counsel's submission that if I were to grant it the obvious will happen in cross-examination, and in the absence of any expert evidence of handwriting, the Court will be in no better position to decide that question and in the end the result would be the Court would be placed in no better position than if it had not allowed cross-examination. In other words, it would not have served any purpose. The cost of the application was agreed at $60.00.

Mr. Robertson then proceeded to submit on the O.14 Summons. Contrary to expectation however, he only wished to proceed instead to ask for an order that the defendants be given conditional leave to defend this action by the 2nd defendant and the 3rd defendant depositing into Court the amount of the claim in the sum of $120,260.35. In adopting this course of action he told the Court that he was therefore abandoning the prayer for final judgment to save the time of the Court we are told. I wish to commend counsel for that consideration.

In support of his application, Mr. Robertson submitted that there was reasonable doubt in the 2nd and 3rd defendants' defences and they therefore cease to be *bona fide*. For instance, as far as his signature was concerned, the 2nd defendant admitted he executed the business letter P-3 but he denies he executed the letter of indemnity P-6(a) – same as CY-3. The plaintiffs' counsel further submitted that the 1st defendant, a limited company, also gave an indemnity. The writ against the 1st defendant was served on the 2nd defendant as its director and as no appearance was entered judgment was given on March 28, 1984. He did not, however, deny that the signature in the indemnity against the company was not his. So much for the 2nd defendant but in respect of the 3rd defendant Mr. Robertson did not submit anything. In short, Mr. Robertson says that the 2nd and 3rd defendants' defences were sham and therefore he prays that they be allowed to defend conditionally.

In reply, Miss Chong Poh Shan pointed to paragraph 5 of the plaintiffs' own reply dated September 19, 1984, which in fact admitted that P-6(a) and CY-3 were, when received from the Plaintiffs' agent in Tawau, indeed blank insofar as the first page was concerned. The plaintiffs' employee then duly filled in P-6(a) and leaving CY-3. Only P-6(a) was returned to their said agent for verification of signature and that of the name of the attesting witness. The plaintiffs further added that P-6(a) and CY-3 are the plaintiffs' standard cyclostyled documents identical in all material terms. In paragraph 7(a) of the same reply, the plaintiffs further stated that their solicitor wrote to the attesting witness, Ho Yun Kiong, and obtained the reply P-17 to the effect that the 2nd defendant did sign P-6(a) and CY-3 in his and his wife's presence but he cannot vouch for the signature of the 3rd Defendant as the 2nd defendant took the form back to his house.

In reply, Mr. Robertson says though the first page of P-6(a) was blank it related merely to matters already within the knowledge of 2nd defendant as it referred to the amount of the loan and the reason for the granting of it.

On these facts as disclosed in the affidavits of the parties, the only issue before the Court is therefore whether the Court should give the 2nd and 3rd defendants conditional leave to defend as prayed.

It is settled that in an application under Order 14 the Court has the power to give unconditional leave to defend or impose such terms as to the giving of security as it thinks fit: Order 14, r.4(3).

In support of his application for conditional leave to defend, Mr. Robertson cited *Fieldrank Ltd.* v. *Stein*[2] approved as followed in *Cho Chin Huat* v. *Lee Boo Hock*[3] and in *Foong Weng Tat* v. *Vu Siew Chin.*[4]

Before I order the 2nd and 3rd defendants be given conditional leave to defend, I must be satisfied that there is no real substantial question to be tried or that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiffs are entitled to judgment (see *Jacobs* v. *Booths Distillery Co.*[5]). I am unable to say that in respect of the 3rd defendant who has managed to raise triable

issues whether she did or did not sign the indemnity making her liable personally. Before the trial Court can come to any certain decision in this respect, the Court may need to hear expert evidence on handwriting in addition to other evidence to be led by the plaintiffs. Apart from that there are matters surrounding the signing of the document of indemnity by the 3rd Defendant requiring close scrutiny which only a full and proper trial will help to highlight. For instance, in plaintiffs' affidavit in reply dated September 19, 1984, we eventually know that the only copy signed and attested was P-6(a) and this was discovered after confirming the matter with the attesting witness, Ho Yun Kiong. Again, if we were to refer to the attestation part of P-6(a) where the supposed signatures of 2nd and 3rd defendants appear making them liable personally by itself without further explanation, it would appear as if the 2nd and 3rd defendants signatures has been attested in front of the said Ho Yun Kiong, whereas in Ho Yun Kiong's reply dated July 30, 1984, P-17 he stated that only Chu Yun signed and Chu Yun brought the documents back home for his wife to sign and the said Ho Chun Kiong was truthful enough to say that the alleged signature of Yip My Chu was not done in his presence.

In regard to the 2nd defendant's defence it was a different matter. I accept that when the 2nd defendant did sign the indemnity, P-6(a), the first page was blank but he well understood the purpose of the indemnity and the purpose of the loan bearing in mind his standing in the business world. I believe Cheng Kam Meng when he swore in paragraph 6 of his affidavit dated September 19, 1984, that in the course of business he was acquainted with the 2nd defendant's signature and the signatures appearing in Exhibit P-3, P-6(a) and CY-3 appear to be the same. This is further strengthened by the letter of Ho Yun Kiong dated July 30, 1984 which confirmed that Chu Yun signed three copies of P-6(a), CY-2 and CY-3 not only in his presence but also in that of his wife, Madam Hing Nyuk Ching. He also confirmed that the said Chu Yun was well aware of what the documents were for and if one were to examine P-6(a) we are to find that the disputed signature of Chu Yun, if believed by the Court, making him liable personally in his personal capacity was in one document and was just below where he signed as Director of the 1st defendant company, thus lending further credence to Ho Yun Kiong's statement that the 2nd defendant did sign the indemnity letter. In spite of Ho Yun Kiong'a apparent inaccuracy in that he held out to have attested to 3rd defendant's signature in P-6(a), I believe him and I make a finding that the 2nd defendant did in fact sign the indemnity in his personal capacity as well and I therefore doubt the *bona fide* of 2nd defendant's defence.

In view of what I have stated above, I therefore order that the 2nd defendant be given leave to defend on condition that he deposit $120,260.35 as prayed within one month hereof failing which the plaintiffs are to have liberty to sign final judgment. In respect of 3rd defendant, however, she is given unconditional leave to defend for reasons I have given. I order that the cost of the present Order 14 application in respect of the 2nd defendant to plaintiffs to be taxed as usual and no order as to cost in respect of 3rd defendant.

Order accordingly.

Solicitors : *Skinner Lind Robertson Pang & Willie; Yap & Chin.*

NG AH KWAY v. TAI KIT ENTERPRISE SDN. BHD.

[O.C.J. (Shankar J.) December 9, 1984]

[Johore Bahru – Companies Winding up No. 30 of 1984]

Company Law – Company unable to pay its debts – Petition to the court for winding up – Petitioner to show debt is undisputed and company is unable to pay – Companies Act, 1965, s. 218.

In this case, the respondent, Tai Kit Enterprise Sdn. Bhd., a housing developer, entered into a contract with the petitioner, a building contractor for constructing certain housing units for the company. The work executed was to be certified by the architect from time to time for payment. The architect had issued certificates estimating the total value of work executed at $626,000. The company made part payment to the extent of $304,538. Subsequently it was agreed by both the parties to terminate the contract. The company contested the certificates of the architect and it was agreed that a quantity surveyor be appointed to estimate the value of the work so far executed. The surveyor estimated the value to be only $396,036. The contractor further alleged that a sum of $200,000 in cash was paid to the company through one of its directors, Mr. S.I. Rajah. The company denied having ever received this amount.

The contractor then served a statutory notice under section 218 of the Companies Act demanding payment for the works executed as well for $200,000 alleged to have been paid to the company. The company disputed both the claims. The contractor then filed a petition for winding up